

Teaching Terror? Exploring the Legal Issues behind Pakistan's Attempts at Madrassah Reform

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I. INTRODUCTION

On January 12th, 2002, Pakistani President Pervez Musharraf gave a momentous address to the nation at a critical time in its history: four months earlier, on September 11th, terrorists shocked the world when they successfully attacked New York City and Washington DC, killing thousands; left with little choice, Musharraf agreed to support the ensuing American invasion of neighboring Afghanistan despite overwhelming opposition from within his own country;¹ then, on December 16th, India suffered a major terrorist attack on its Parliament building for which it immediately blamed Pakistani-based militants² and then raised the stakes by deploying some 500,000 troops along its western border,³ thus leaving Pakistan in a heightened state of tension on all fronts—unrest within, a war to the west, and a potentially larger one to the east. Realizing, perhaps, that his country was being dubbed the next international terrorist hub,⁴ Musharraf spoke out on how he would prevent that from happening.⁵

“Strict action will be taken,” he said, “against any Pakistani individual, group or organization found involved in terrorism within or outside the country.”⁶ The message was clear: terrorism, extremism, and sectarianism would no longer be tolerated in Musharraf’s “progressive Islamic state.”⁷ Specifically, he promised bold initiatives to further monitor or ban extremist

[¶] This paper was written in the summer of 2004 as a part of course work in New York University (NYU) School of Law.

¹ See Jill McGivering, *Pakistanis' Patience Wears Thin*, BBC NEWS, Oct. 31, 2001, at http://news.bbc.co.uk/1/hi/world/south_asia/1630326.stm.

² See *Indian Parliament Attack Kills 12*, BBC NEWS, Dec. 13, 2001, at http://news.bbc.co.uk/1/hi/world/south_asia/1707865.stm.

³ See *India 'Continues Troop Build-up'*, BBC NEWS, Jan. 1, 2002, at http://news.bbc.co.uk/1/hi/world/south_asia/1736800.stm.

⁴ See Owais Tohid, *Analysis: Musharraf on a Tightrope*, BBC NEWS, Jan. 7, 2002, at http://news.bbc.co.uk/1/hi/world/south_asia/1742651.stm.

⁵ President Pervez Musharraf, Address to the Nation (Jan. 12, 2002) (transcript available at http://www.infopak.gov.pk/President_Addresses/President_address.htm).

⁶ *Ibid.*

⁷ *Id.*

militant groups, strengthen Anti-Terrorist Courts, and better train and equip local law enforcement, but most emphatically, he vowed to regulate the vast number of Pakistani *madrassahs* or *madaris* (religious seminaries).⁸ No other issue received as much attention during the President's address, in fact, as the nation's *madrassahs*. Musharraf honored the glorious role they played throughout Islamic history and continue to play in Pakistan, but alleged that a number of them had been co-opted and were being used to spread "political and sectarian prejudices."⁹ Simply put, he subtly laid a large part of the blame for the perpetuation of fundamentalist fervor in Pakistan at the doorstep of the *madrassah* system. To counter this phenomenon and "restore [the] status of *madaris* to what it originally was," he concluded, his government would introduce a promising "new *Madaris Ordinance*" that would regulate the functioning of religious schools by implementing the same rules and regulations that apply to other educational institutions.¹⁰

The speech was closely watched by millions across the subcontinent and was widely covered by Pakistani, Indian, and international media,¹¹ eliciting a variety of responses and predictions over whether Musharraf's powerful words would, in fact, translate into results.¹² Two years later, millions are still wondering the same thing. Even now, as Pakistani troops find themselves in increasingly bloody encounters with remnants of Taliban and al-Qaeda fighters dug in near the Afghan border,¹³ we continue to witness the devastating effects of an arguably *madrassah-produced* jihadi culture and thus the debate continues. Have the General's executive orders and legislative initiatives since the address effectively countered extremist elements in Pakistani society?

Much has been written praising Musharraf for his commitment to the so-called "War on Terror"¹⁴ and possibly even more has been published criticizing his alleged failure to reign in militants operating in Afghanistan,

⁸ Id.

⁹ Id.

¹⁰ Id.

¹¹ See generally *South Asia Media Digests Musharraf Address*, BBC NEWS, Jan. 13, 2002, at http://news.bbc.co.uk/1/hi/world/monitoring/media_reports/1758138.stm (citing *inter alia* TIMES OF INDIA, HINDUSTAN TIMES, THE NEWS, and THE NATION).

¹² See Stephen Cviic, *Analysis: Musharraf's Gamble*, BBC NEWS, Jan. 12, 2002, at http://news.bbc.co.uk/1/hi/world/south_asia/1757449.stm.

¹³ See, e.g., *Pakistan Steps up al-Qaeda Drive*, BBC NEWS, April 2, 2004, at http://news.bbc.co.uk/2/hi/south_asia/3593395.stm.

¹⁴ Notably by the United States and United Kingdom governments, as allies in the "War on Terror." See, e.g., *US Hails Musharraf's 'Firm Stand'*, BBC NEWS, Jan. 13, 2002, at http://news.bbc.co.uk/1/hi/world/south_asia/1757566.stm; *UK Praises 'Courageous' Musharraf*, BBC NEWS, Jan. 12, 2002, at http://news.bbc.co.uk/1/hi/uk_politics/1757381.stm.

Kashmir, and within Pakistan,¹⁵ but very little attention has been paid to the *legal* aspects of Musharraf's acts. The Constitution of Pakistan guarantees fundamental rights and freedoms to its citizens and only grants expressly limited powers to the different branches of government,¹⁶ but do Musharraf's ambitions uphold those legal guarantees or simply disregard them when politically inconvenient? Can the government legally ban some religious schools and control others as it pleases?

Although such questions may not be very complicated in regard to, say, the recently amended Anti Terrorism Act, which seeks to curtail *violent* terrorist activity and thus legally enjoys a lesser constitutional standard of review,¹⁷ they are profoundly important in the context of madrassahs, a fundamentally essential *educational* component of Pakistani society. That is, madrassah schools and seminaries are a necessity for hundreds of thousands of children (Pakistani, Afghan refugee, and otherwise) and a reality for a country with an inadequate public education system¹⁸ and thus any attempt at bringing them within the government's fold strikes at the heart of the constitution and must be closely examined for the protection of civil liberties.

The purpose of this paper is to evaluate the Musharraf government's recent anti-terror initiatives in Pakistan, focusing on both the wisdom and constitutionality of the attempted regulation of the country's madrassah system, especially in regard to the forced registration and prohibition of select schools. Specifically, it considers whether the *Deeni Madaris (Voluntary Registration and Regulation) Ordinance 2002* and the ensuing government action contravene any Fundamental Rights or extend beyond the governmental powers conferred by the Constitution of the Islamic Republic of Pakistan. Finally, it will assess the government's position and policy goals toward madrassah reform and explore possible means through which the legislation may be affected to achieve its objectives while respecting the constitutional protection of civil liberties.

In the 2002 speech, Musharraf admitted that "Pakistan has been made a soft state where the supremacy of law is questioned," but went on to declare

¹⁵ Notably by the Indian government and Western media and policy groups. See *infra* pp. 20-22.

¹⁶ PAK. CONST. (1973) pt. II, ch. 1.

¹⁷ 1998 M.L.D. 1411 (holding that to treat heinous and terrorist acts differently than the ordinary offences to be dealt with by a different forum was a reasonable classification which did not offend the guarantees of equal protection of law or equality before law within the meanings of Arts. 4 and 25 of the Constitution of Pakistan); See also MIAN ABDUL GHAFFAR, AN EXHAUSTIVE COMMENTARY ON THE CONSTITUTION OF ISLAMIC REPUBLIC OF PAKISTAN 60 (Irfan Law Book House 2000).

¹⁸ INTERNATIONAL CRISIS GROUP, ICG ASIA REPORT N.36, PAKISTAN: MADRASAS, EXTREMISM AND THE MILITARY 3 (July 29, 2002).

that “[t]his situation can not be tolerated anymore.”¹⁹ Musharraf was right to assert the need for a well-established and respected Rule of Law in Pakistan, but questions of legality and constitutionality must be considered side by side with politics and policymaking in Pakistan for that to happen—and legislation by Musharraf’s government is the perfect place to start. The questions posed by this paper carry great normative importance and should be researched and discussed to promote the much-needed legal culture in Pakistan that Musharraf called for.

II. ON MADRASSAHS

Contemporary discussions of madrassahs consistently, if not exclusively, focus on highly charged practices and phenomena, evoking only “images of jihad, warfare training, terrorism and an archaic system of education.”²⁰ For the most part, these perceptions are generalizations and oversimplifications of a complex historical and socio-political situation in which only a minority of the schools are involved. Pakistan’s madrassahs are part of a noble tradition of Islamic religious learning, dating back almost a thousand years.²¹ Moreover, they continue to play a vital role in Pakistani society; although there are no official numbers, it is estimated that up to one third of all school-going children in Pakistan attend madrassahs.²² Still, there is indeed a problem: Ministry of Education officials speculate that 10 to 15 percent of madrassahs could have links with sectarian militancy or international terrorism and though the statistics are admittedly unreliable, it is clear that the unprecedented growth of madrassahs over the past two decades reflected the rise of religious extremism in the country.²³

For most of Pakistan’s history, madrassahs numbered in the low hundreds and primarily devoted themselves to training the next generation of religious leaders (*ulema*) and functionaries;²⁴ this changed drastically in the 1980s. Part of a larger Islamization policy, General Zia ul Haq instituted an automated *zakat* (religious charity) system, which included madrassahs

¹⁹ Musharraf, *supra* note 5.

²⁰ Robert Looney, *Reforming Pakistan’s Educational System: The Challenge of the Madrassas*, 28 J. SOC., POL., & ECON. STUD. 3, 258 (Fall 2003).

²¹ See, e.g., Munir Ahmed, *Islamic Education Prior to the Establishment of Madrasa*, J. ISLAMIC STUD., 1987

²² See Economic Survey (2001-2002), Ministry of Finance, Government of Pakistan, ch. 11, p. 2.

²³ Looney, *supra* note 20 at 262.

²⁴ P.W. Singer, *Analysis Paper #14: Pakistan’s Madrassahs: Ensuring a System of Education Not Jihad*, THE BROOKINGS INSTITUTE, Nov. 2001.

as beneficiaries, creating new incentives for opening religious schools.²⁵ As the public school system worsened, children of Pakistani elite were sent to far superior private schools, leaving the growing number of madrassahs to fill the gap. With few other options, poor parents began to send their sons to madrassahs, where they received at least some education and often food and clothing as well.²⁶

At the same time, the Soviet invasion of Afghanistan and the subsequent involvement of Pakistan in the war opened the doors for millions of Afghan refugees and introduced the radicalism of a jihad movement into the country. Thousands of new schools opened during the war, motivated not only by government support but by large donations from foreign foundations and charities (mainly coming from organizations in Saudi Arabia and other Gulf States, but aided and fomented in no small part by covert US operations).²⁷ The madrassahs provided a welcome home for countless refugee children and also acted as orphanages for many of the parentless victims of the war.²⁸

Today, the Pakistani madrassahs continue to be funded both by *zakat* collected by the Pakistani government and by private donations from Middle Eastern countries. As a result, countries like Saudi Arabia have had a disproportionate influence on school curriculum and orientation, tending to infuse them with *Wahabi* beliefs, a more extreme and puritanical version of Islam.²⁹ The precise number of madrassahs is unknown but the Ministry of Education puts the figure around 10,000, with as many as one million to 1.7 million students attending classes, at least for a short period.³⁰

However, not all madrassahs are identical. Some offer education in basic math, science, and literature on top of the standard religious curriculum. Others are even more sophisticated, aiming at the same level of education found in Pakistan's more elite schools. In *Anjuman Faizul Islam*, a well funded madrassah in Rawalpindi, boys and girls—many of whom are orphans—study together until fifth grade, and then continue their studies

²⁵ Id. Money thus became automatically deducted from bank balances and dispersed at the local level to institutions deemed worthy of support by religious leaders.

²⁶ Singer, *supra* note 24.

²⁷ See MUHAMMAD AAMAR RANA, *JEHAD-E-KASHMIR-O-AFGHANISTAN* (Mashal Books 2003).

²⁸ Singer, *supra* note 24.

²⁹ Wahabi beliefs have clearly been imported into a significant portion of the Pakistani madrassah system, but the schools are still generally categorized into five distinct types divided along sectarian and political lines: *Deobandi* and *Brelvi* schools are the two main Sunni types; the *Ahle Hadith (Salafi)* have their own schools, as do the Shias; and the *Jamaat-e-Islami* stay clear of sectarian tags. Looney, *supra* note 20 at 260.

³⁰ *Ibid* at 261.

separately until the tenth grade.³¹ Of course, the *raison d'être* of all Pakistani madrassahs, like nearly all madrassahs in the world, is still to teach Islamic subjects such as the Qur'an, *Hadith* (the Prophet's traditions), Islamic law, jurisprudence, and logic,³² and the crux of the problem in many contemporary Pakistani schools comes down to the atmosphere of the schools, the *type* of Islam that they teach, and the underlying messages that they impart: an "education that creates barriers to modern knowledge, stifling creativity and breeding bigotry."³³ Schools like *Anjuman* have come to be notable exceptions.

The primary worry with the madrassah system is not their explosion of numbers or relatively new fundamentalist ideologies, but the implications of the radical minority of them. The estimated 10 to 15 percent of the schools affiliated with extremist religio-political groups hijack their original educational purpose and teach a distorted version of Islam in which hatred is permissible, jihad allows the murder of civilians, and martyrdom through suicide attacks is glorified. Many of the radical madrassahs also include combat training for their students who, not surprisingly, go on to join jihad struggles or terrorist movements. The Taliban famously found their roots among the young boys from crowded refugee camps taught as such radical madrassahs.³⁴ It is also believed that all of the sectarian parties banned by the Musharraf government either originated in jihadi madrassahs or developed their own chains.³⁵ Even more worrisome is that up to half of the students in many of the radical madrassahs are foreigners that join various conflicts around the world upon completing their training, thus internationalizing their "virulent influence."³⁶

³¹ Scott Baldauf, *Pakistan's Two Schools of Thought*, THE CHRISTIAN SCIENCE MONITOR, Oct. 3, 2001, at <http://www.csmonitor.com/2001/1003/p7s1-wosc.html>.

³² See Uzma Anzar, *Islamic Education: A Brief History of Madrassas with Comments on Curricula and Current Pedagogical Practices*, presented at World Bank sponsored workshop (March 2003) (transcript available at http://www1.worldbank.org/education/social_cohesion/doc/Islamic%20Education%20Paper.pdf).

³³ 36 ICG ASIA REPORT, *supra* note 18 at 3.

³⁴ See, e.g., Singer, *supra* note 24; David Rohde, *A Prisoner's Journey From the Classroom to the Taliban*, N.Y. TIMES, Sept. 1, 2003.

³⁵ 36 ICG ASIA REPORT, *supra* note 18 at 12 (including the *Sipah-e-Sahaba Pakistan*, *Jaish-e-Mohammed*, *Lashkar-e-Jhangvi*, *Lashkar-e-Tayaba*, *Tehrik Nifaz-e-Shariah Mohammedi*, and *Sipah-e-Mohammed*).

³⁶ Singer, *supra* note 24.

III. ON THE LAW: LEGISLATIVE ATTEMPTS AT MADRASSAH REFORM

Even before the September 11th attacks on the United States, the Pakistani government was well aware of the potential for serious problems from the religious school sector, as evidenced by President Musharraf's preliminary steps toward madrassah reforms. Just two months after taking power in a coup,³⁷ the National Security Council—the new military government's highest decision making body—formed a working group “to improve the existing madrassahs and to secure fuller coordination among the madrassahs and the national education system.”³⁸ Based on the recommendations of the group, the President's cabinet took its first swipe at the worsening situation and issued the *Pakistan Madrassah Education (Establishment and Affiliation of Model Deeni Madaris) Board Ordinance 2001* on August 18th, 2001.³⁹ By the time Musharraf gave his address in January, however, in the midst of Pakistan's international and domestic crisis,⁴⁰ it was clear that far more aggressive legislation was needed—and urgently. On June 19, 2002, the government gave its answer and issued the *Deeni Madaris (Voluntary Registration and Regulation) Ordinance 2002*,⁴¹ claiming to finally have come through on the President's promises.⁴²

The first piece of legislation, the Model Deeni Madaris Ordinance of 2001, was aimed broadly at integrating the madrassah education system with the greater national system of education.⁴³ Specifically, it established a “Pakistan Madrassah Education Board” (PMEB),⁴⁴ which, as the title of the ordinance suggests, was mandated to create “model” madrassahs around the

³⁷ See *Pakistan Army Seizes Power*, BBC NEWS, Oct. 12, 1999, at http://news.bbc.co.uk/1/hi/world/south_asia/472511.stm.

³⁸ 36 ICG ASIA REPORT, supra note 18 at 24.

³⁹ Hereinafter Model Deeni Madaris Ordinance, ORDINANCE NO. LX of 2001 (full text available at <http://www.pakistan.gov.pk/religious-affairs-division/policies/madaris-ordinance.pdf>, Religious Affairs, Zakat and Ushr Division).

⁴⁰ See supra p. 4.

⁴¹ Hereinafter Deeni Madaris Registration Ordinance (full text available at <http://www.hvk.org/articles/0702/26.html>, THE NEWS, June 22, 2002).

⁴² *Preaching Hatred in Madaris Not to be Allowed: Minister*, DAWN, June 20, 2002.

⁴³ Model Deeni Madaris Ordinance § 3(1).

⁴⁴ *Ibid.* § 4. The Board consists of the secretaries of the Ministry of Education and Ministry of Religious Affairs; the chairman of the University Grants Commission; two ulema who are or have been members of the Council of Islamic Ideology; the director general of the Dawa Academy of the International Islamic University, Islamabad; a professor who is also the head of the department of Islamic studies in a university; provincial education secretaries of all the four provinces; a president or Nazim of a madrassah *wafaq*; the president of the Tanzim al-Madaris; and the Nazim of the Rabita al-Madaris.

nation that teach normally prescribed Islamic courses but also include standard English, mathematics, social studies, and elementary science from the primary to secondary school levels. At the intermediate and higher levels, the schools would also incorporate computer science, economics, political science, law, and Pakistan studies into the curriculum.⁴⁵

The Board finalized its curriculum and finally set up one fully-functioning and well-funded “model madrassah” each in Islamabad, Karachi, and Sukkur.⁴⁶ Madrassah unions (*wafaqs*) were then asked to affiliate with the PMEBS and follow the lead of the model schools by modernizing their curricula as demonstrated. Endowed with little authority over the madrassahs, the PMEBS offered special incentives, promising that schools which affiliated with the PMEBS and introduced the proposed courses could be authorized to conduct examinations and issue degrees and possibly even be granted university status.⁴⁷ Still, a recent report indicates that only 449 madrassahs (out of thousands) applied for affiliation with the PMEBS, despite the fact that the primary procedural requirement for affiliation was the approval of a simple questionnaire regarding voluntary information about the school’s functioning.⁴⁸ Although the Model Deeni Madaris Ordinance remains in effect as good law, without the authority to enforce registration, both the PMEBS and the Ordinance were never much more than wishful thinking or perhaps half-hearted gestures intended more to assuage international concern than to change the madrassahs’ condition.

After President Musharraf’s national address, the government issued another ordinance, this one far tougher than the first. The Madaris Registration Ordinance of 2002 was announced on June 19th of that year and was hailed as a major step toward madrassah reform.⁴⁹ The primary purpose of the legislation this time around was not to encourage integration via curriculum change, but to effectively require the registration and financial regulation of all Islamic schools in the country.

The ordinance called for the creation of a Provincial Madrassah Education Board in each province, through which all madrassahs should ‘voluntarily’ register within six months. Madrassahs that chose not to register with their respective PMEBS or comply with the requirements of the ordinance would be barred from receiving *zakat*, financial assistance, or any

⁴⁵ Id. § 13.

⁴⁶ *Plans & Achievements*, Research and Reference Wing, Religious Affairs, Zakat and Ushr Division, at <http://www.pakistan.gov.pk/religious-affairs-division/informationandservices/research-reference-wing-03.html>.

⁴⁷ MINISTRY OF EDUCATION, GOVERNMENT OF PAKISTAN, EDUCATION SECTOR REFORM: ACTION PLAN 2001-2004 (Jan. 1, 2002).

⁴⁸ INTERNATIONAL CRISIS GROUP, ICG ASIA REPORT N.73, UNFULFILLED PROMISES: PAKISTAN’S FAILURE TO TACKLE EXTREMISM 6 (Jan. 16, 2004).

⁴⁹ See Editorial, *Regulating Madrassahs*, DAWN, June 22, 2002; Burhanuddin Hasan, Opinion, *Reforming Religious Education*, THE NEWS, July 3, 2002.

other benefit from the government. It was made clear by government officials that this would likely include fining or closure.⁵⁰ The remainder of the statute was devoted to the new requirements for registered madrassahs. The most important features stipulated that registered madrassahs must: submit detailed information on all of their educational activities and methods, make their finances and assets available for auditing, and refrain from preaching sectarian hatred or militancy. Perhaps the most major blow to the existing madrassah system was the ordinance's requirement that no registered madrassah may accept any foreign aid, foreign students, or appoint foreign teachers without the permission of the federal government.⁵¹

The ordinance went into effect immediately⁵² and although it only sought 'voluntary' madrassah participation officially, the reality was quite different and all parties knew it. According to Section 7 of the statute:

7. Bar on receiving Zakat and financial assistance etc. – No Deeni Madrassah shall be eligible to receive Zakat or any financial assistance, grant, donation, aid or other benefit from Federal Government or Provincial Government unless registered under this Ordinance.

The amount of money madrassahs receive from zakat or government grants is miniscule, however, in comparison to their private sources of income. The government collects approximately Rs. 5 billion annually, of which only a tenth is meant for madrassahs.⁵³ On the other hand, madrassahs collect over Rs. 70 billion from resident Pakistanis.⁵⁴ It is important to note, though, that most do not support the politics or extremist ideologies of the religious parties but simply find Islamic causes and the preservation of Islamic education the most worthy choice for charity. Still, the largest source of funding for madrassahs is external, coming from foreign donations via unofficial channels. Due to the government's inability to monitor these

⁵⁰ See, e.g., BUREAU OF DEMOCRACY, HUMAN RIGHTS AND LABOR, U.S. DEPT. OF STATE, INTERNATIONAL RELIGIOUS FREEDOM REPORT 2003: PAKISTAN, at <http://www.state.gov/g/drl/rls/irf/2003/24473.htm>; Susannah Price, *Pakistan Religious Schools Deadline*, BBC NEWS, June 19, 2002, at http://news.bbc.co.uk/1/hi/world/south_asia/2054719.stm.

⁵¹ Deeni Madaris Registration Ordinance § 8-21. For foreign students and teachers, this "permission" requires a proper visa and a "No-Objection Certificate" from the Ministry of Interior.

⁵² See, e.g., BUREAU OF DEMOCRACY, HUMAN RIGHTS AND LABOR, *supra* note 50.

⁵³ State Bank of Pakistan, *Annual Report 2002-2003, Public Finance and Fiscal Policy*, at <http://www.sbp.org.pk/reports/annual/arFY03/CHAP4.pdf>; *Zakat fund being increased to Rs. 5 billion*, DAWN, May 20, 2002.

⁵⁴ AGA KHAN DEVELOPMENT NETWORK, PHILANTHROPY IN PAKISTAN: A REPORT OF THE INITIATIVE ON INDIGENOUS PHILANTHROPY sec. 4, 44 (Aug. 2000).

donations, exact information is difficult to obtain, but estimates of the foreign funding exceed US \$2 billion.⁵⁵

Thus the ordinance would have had little effect on the majority of madrassahs, even if their representatives scoffed at the government's pecuniary threats. But the administration came out strong, backing the ordinance with harsh and seemingly uncompromising language, which promised severe punitive measures for any school that failed to register and cooperate with its respective PMEAB. Information Minister Nisar Memon warned that, "If any madrassahs contravene [the ordinance requirements], they will attract closure or fine or both."⁵⁶ Minister for Religious Affairs Dr. Mehmud Ahmed Ghazi set the timeframe for the registration process during the public announcement of the ordinance, maintaining that "every Madrassah would be bound to register itself with the FMEAB or the PMEAB within six months."⁵⁷ Despite the apparent voluntary nature of the law, then, the reality on the ground became that all madrassahs were effectively required to apply for registration and open their financial books for the government.

Outraged, all of the *wafaqs* (madrassah boards) banded together as the *Ittehad Tanzeemat Madaris-i-Deenia* (Alliance of the Organizations of the Religious Schools) to oppose the ordinance⁵⁸ and more generally to combat the "pressure of the West against the Islamic identity of Pakistan and its madrassahs."⁵⁹ The greater *Muttahida Majlis-i-Amal* (MMA), a coalition of the nation's religious parties, also joined the Ittehad as they staged rallies against the Madaris Registration Ordinance and observed a "black day" exactly one week after the announcement of the ordinance.⁶⁰ The protesters lambasted the government's new policy and vowed "to resist its enforcement tooth and nail."⁶¹ The points of contention all revolved around the requirements of mandatory registration and official financial scrutiny.⁶²

After a few months, some 1,200 out of approximately 10,000 madrassahs had registered under the ordinance, but most refused to cooperate and had an extremely vocal body of religious parties to back them up.⁶³ The government sponsored talks on the ordinance with the madrassah leaders, but little agreement was reached as both sides remained firm (with the Ittehad demanding the complete withdrawal of the ordinance and the government insisting that the law was already approved and could not

⁵⁵ 36 ICG ASIA REPORT, supra note 18 at 16.

⁵⁶ Price, supra note 50.

⁵⁷ *Preaching Hatred in Madaris Not to be Allowed: Minister*, supra note 42.

⁵⁸ See Amjad Mahmood, *Seminaries Plan Protest Drive*, DAWN, July 19, 2002.

⁵⁹ BUREAU OF DEMOCRACY, HUMAN RIGHTS AND LABOR, supra note 50.

⁶⁰ *Religious Parties Stage Protest Rally: Madaris Ordinance*, DAWN, June 29, 2002.

⁶¹ *Madaris Reject Ordinance*, DAWN, June 27, 2002.

⁶² Mahmood, supra note 58.

⁶³ BUREAU OF DEMOCRACY, HUMAN RIGHTS AND LABOR, supra note 50.

simply be reversed).⁶⁴ Apparently unwilling to confront the ulema, the government ultimately postponed the implementation of the ordinance.⁶⁵ After the October 2002 elections, the issue was effectively put on hold and by the end of the year, no madrassahs were closed or otherwise penalized for failure to comply with the ordinance.⁶⁶ The failure of the ordinance to win the backing or even compliance of religious leaders is believed to have cost Dr. Mehmood Ghazi, the then federal religious affairs minister, his job.⁶⁷

It should be noted, though, that the ordinance *was* partially effective during its brief life span. While most of the government's threats were ignored or challenged, its promise to monitor all foreign madrassah students led to surprising results. It is not known how many of the students actually returned to their countries or were handed over to US terrorism investigators, but after announcing that foreign students were under government scrutiny, hundreds left the madrassahs voluntarily.⁶⁸

IV. ON THE LAW: FAILURE TO IMPLEMENT AND THE CRITICAL RESPONSE

The *mullahs'* (religious leaders) charged that the highly publicized madrassah reforms represented nothing more than a weak government's acquiescence to Western hegemony.⁶⁹ Their fears were arguably well-founded and not difficult to understand. There is no doubt that the President's January 2002 address was prompted by the terrorist attacks on the United States and India and that both the speech and the legislation that came out of it were designed in part to pacify Washington and New Delhi. To that extent, Musharraf's policies were extremely successful—at least for the time being. President Bush was evidently convinced and praised Musharraf in his own State of the Union address.⁷⁰ Bush further sided with the Pakistani President during a joint press conference at the White House a few weeks later, "I want to applaud [President Musharraf]," said Bush in response to a question on madrassah reform, "for making a visionary

⁶⁴ Faraz Hashmi, *Government Firm on Madaris Law*, DAWN, July 7, 2002.

⁶⁵ Zulfiqar Ali, *EU Ready to Help Madaris*, DAWN, Sept. 2, 2002.

⁶⁶ BUREAU OF DEMOCRACY, HUMAN RIGHTS AND LABOR, *supra* note 50.

⁶⁷ Nadeem Iqbal, *'Upgrading' Madrassas*, THE NEWS ON SUNDAY, June 29, 2003.

⁶⁸ Looney, *supra* note 20 at 267.

⁶⁹ *See Jamaat Criticizes Madaris Ordinance*, DAWN, June 24, 2002.

⁷⁰ President George W. Bush, State of the Union Address (Jan. 29, 2002) (transcript available at

<http://www.cnn.com/2002/ALLPOLITICS/01/29/bush.speech.txt/index.html>).

statement about education.”⁷¹ Toward the end of the year, even tensions with India eased as both governments pulled back troops from the Indo-Pakistani border.⁷²

Also by the end of the year, however, Musharraf’s highly anticipated solution to the madrassah crisis failed. The President decided to back off when the Deeni Madaris Registration Ordinance faced serious resistance from the religious alliance. Striving to maintain a delicate balance—pleasing his Western allies, while not upsetting the sizable and vocal religious establishment within Pakistan—Musharraf allowed his reform-minded policy to effectively degenerate into “a decorative rather than substantive piece of law.”⁷³

International critics, media, and policy groups have blasted the Musharraf government for its inability to stand up to the religious parties and enforce the necessary reforms. *The New York Times* called the government “too nervous to clamp down directly on the 10,000 madrassahs in Pakistan, the Islamic schools often accused of spreading religious extremism.”⁷⁴ The Belgian based International Crisis Group (ICG) published a highly influential report on Pakistan’s madrassahs. Referring to the debate over the Madaris Registration Ordinance, the report concludes:

It appears that the clergy’s defiance will prevail. Instead of taking strong action and laying down a clear legal framework, the Musharraf government is dithering. Its policy is incoherent and it has displayed a lack of will to introduce any law that might antagonize the clergy. Co-opting and appeasing the clergy is its way of going about reforms. In doing so, Musharraf has gone even further than the clergy’s former patron, General Zia.⁷⁵

The ICG report, by far the most comprehensive and widely-read of its kind, provides a scathing review of Musharraf’s initiatives and recommends that international donors should “[h]old the Pakistani government to its commitments to madrassah reform.”⁷⁶ The ICG’s criticism is especially important because it is representative of the general international response to the madrassah “problem.” That is, nearly all coverage of the government’s

⁷¹ Remarks by President Bush and President Musharraf of Pakistan in Press Availability, The White House (Feb. 13, 2002) (transcript available at <http://usinfo.state.gov/topical/pol/terror/02021310.htm>) (referring to President Musharraf’s January 2002 national address, which provided a blueprint of the government’s plans toward madrassahs).

⁷² See *India Begins Border Pullback*, BBC NEWS, Oct. 25, 2002, at http://news.bbc.co.uk/1/hi/world/south_asia/2358455.stm.

⁷³ Editorial, *Madaris Registration*, DAWN, Aug. 17, 2002.

⁷⁴ Ian Fisher, *Pakistani Clerics Fight School Plans*, N.Y. TIMES, Aug. 4, 2002.

⁷⁵ 36 ICG ASIA REPORT, *supra* note 18 at 26.

⁷⁶ 36 ICG ASIA REPORT, *supra* note 18 at iii.

backtracking from its policy position disapproves of the President's actions, labeling him weak and uncommitted. The literature consistently calls on the government to take on the mullahs and reign in extremists and their schools.

Such critics of the government seem reasonable, particularly regarding madrassahs linked to militant groups, and they are right to demand and expect commitment from a government toward its own public policies, but their analyses are generally too harsh and overly simplistic. In an interview with *The New York Times*, the author of the ICG report claimed that the victory by the clerics in resisting the ordinance would translate into "a further entrenchment of the religious lobby." He added, "Now it will gain further nuisance value."⁷⁷ The author's attitude expresses a frustrated indifference toward the clergy's position, considering it a mere "nuisance." Like the recommendations made by the ICG, the majority of such calls for the government to strictly enforce the Madaris Registration Ordinance disregard any empirical data on previous governmental attempts at madrassah registration, steamroll over the Ittehad's complaints, and ignore the underlying problems with the law, seeking only the intense and immediate regulation—if not complete overhauling—of all madrassahs. I contend that a more sophisticated approach is warranted.

V. ON THE LAW: PROBLEMS UNDERLYING THE FAILURE HISTORICALLY & LEGALLY

The public debate over the Madaris Registration Ordinance and madrassah reform more generally has been reduced to black and white polemical positions. On one side, critics of the government argue for the urgent need to bring the madrassah system under the government's control—or at least under its close watch. They condemn the government's capitulation to the religious opposition and continue to point out that the President has yet to come through on his promises of January 2002. "Most importantly," declared a more recent ICG report on Pakistan, "Musharraf has yet to curb the abuse of madrassahs and mosques by religious extremists."⁷⁸ Of course, the religious parties protesting the ordinance only make similarly monotonous arguments, albeit on the other end of the ideological spectrum. That is, the MMA and Ittehad stubbornly oppose any substantive steps toward madrassah reform, insisting that the government's actions are part of a larger Western plan to control Islam and its propagation.⁷⁹

⁷⁷ Fisher, *supra* note 74.

⁷⁸ 73 ICG ASIA REPORT, *supra* note 48 at 5.

⁷⁹ See *supra* notes 57-63.

The only effective way out of the impasse is to evaluate the problem in a more nuanced fashion. Both sides of the issue must be addressed and further complicated. First, any attempt to examine the potential efficacy of the Madaris Registration Ordinance must consider the problem in a larger historical context. Second, critics of the government, as well as the government itself, should look beyond the mere rhetoric of public protest and seek to understand the religious alliance's actual complaints and concerns with the legislation, which, after all, affects them more directly and immediately than any other party to the dispute. The government may realize that at the heart of their apprehensions with the law are a number of valid legal critiques that need to be taken seriously.

A. *Historical Critique*

After the President promised to handle the madrassah crisis during his national address, one madrassah instructor told a reporter, "Musharraf must learn from what happened to Ayub Khan, Nawaz Sharif, and Benazir Bhutto. All of them tried to undermine religious education under Western influence and met divine punishment."⁸⁰ Critics and policy analysts seem to overlook the history behind madrassah reform in Pakistan. It is well known that the recent boom in madrassahs as well as the introduction of extremist overtones to a sector of the Islamic schools are a product of the war in Afghanistan and the Zia government.⁸¹ It is also widely agreed that the Taliban grew out of these schools and were further empowered by the Benazir Bhutto government in the mid 1990s as agents and partners in regional trade with Afghanistan.⁸² Yet, the civilian governments of Pakistan—following the military rule of the 1980s and preceding the coup of 1999—did try to contain the power of the mullahs and to reform the madrassah system.

The end of the Soviet war in Afghanistan brought the Pakistani jihadis back home and their increasing numbers added to the strength of the extremists within Pakistan. Moreover, the Taliban's eventual successes in taking over Afghanistan and imposing puritanical Islamic rules further emboldened Sunni hardliners in Pakistan. Concerns about the threats posed to national security by the assertive nature of the jihadi movements motivated the Benazir government to check their growth. Benazir immediately faced resistance from Pakistan's military and intelligence services (ISI), however, who continued to support the Taliban, seeking

⁸⁰ ICG interview with Irfan-ul-Haq Haqqani, instructor at Akora Khattak (March 2002), in 36 ICG ASIA REPORT, supra note 18 at 25.

⁸¹ See supra notes 25-28 and accompanying text.

⁸² See generally *Analysis: Who are the Taliban?*, BBC NEWS, Dec. 20, 2000, at http://news.bbc.co.uk/1/hi/world/south_asia/144382.stm.

“strategic depth” in Afghanistan, and to encourage the jihadis to “bleed India in Kashmir.”⁸³

Still, Benazir managed to issue some reforms and promised more. Like Musharraf, she ordered that all foreigners were required to obtain a “No Objection Certificate” in order to enroll in Pakistani madrassahs, thus allowing the Foreign Ministry to investigate all foreign students before granting them entry.⁸⁴ She further commissioned reports from all provincial governments to research the state of the madrassah system and discovered that hundreds of the schools throughout the country were engaged in extremist activity.⁸⁵ In response, the Interior Minister announced the government’s plan to introduce a regulatory madrassah law, which would impose compulsory audits, new curricula, and registration.⁸⁶

Bhutto’s proposed legislation seems strikingly similar to Musharraf’s anti-extremism strategy, and perhaps not surprisingly, met a similar fate. The Bhutto government’s intention to curb extremism in the nations madrassahs sparked outrage from the religious parties. One religious group governing a district in the North West Frontier Province (NWFP) threatened to impose Taliban-style order in the area it controlled. Also like the Musharraf government, then, Benazir’s government retreated and nothing else was done before her administration was dismissed in late 1996.

Benazir’s successor, Prime Minister Nawaz Sharif, echoed her concerns and vowed to weed out sectarianism. The Sharif government’s campaign against extremism was more “criminal-specific,” however, and not aimed directly at madrassahs, but a number of figures related to madrassahs were arrested during anti-militancy drives. Overall, Sharif’s campaigns only saw limited success. While the majority of extremist madrassahs operated in the NWFP and Azad Kashmir, he focused almost exclusively in the Punjab, arguably out of political expediencies.⁸⁷

What becomes clear after only a brief examination of the history of madrassah reforms in Pakistan is that President Musharraf’s crack at it is not the first. Benazir’s initiatives mirror the goals of both the Model Deeni Madaris Ordinance and the Madaris Registration Ordinance, and yet none of the laws yielded the desired results. All governments since the birth of the new Pakistani madrassah order (during the Afghan jihad), it seems, have perceived the extremist madrassahs to be a threat—or at least accused them

⁸³ Mubashir Zaidi, *Interview: Former ISI Chief, Hameed Gul, “The Loss of Strategic Depth can be Attributed to the Unholy Shadow of the Foreign Office,”* DAWN: HERALD, Dec. 2001.

⁸⁴ See Nasir Malik, *Financial Squeeze to Discipline Madrasa*, DAWN, Jan. 23, 1995.

⁸⁵ See, e.g., *746 Punjab Madrasas Involved in Sectarian Activities*, THE NEWS, Mar. 7, 1995.

⁸⁶ See *Law to Check Working of Religious Schools Soon*, THE NEWS, Jan. 2, 1995.

⁸⁷ See Nasir Jamal, *Madrasas: Who Control What They Teach*, DAWN, Dec. 31, 1996.

of being one, perhaps as a scapegoat for their own failures—but none have been able to effectively regulate their operations. All efforts to do so have seen the respective governments retreat in the face of vocal opposition from the mullahs, backed with the threat of inciting violence. That there is a grave problem is obvious and simply giving up is not an option, but both critics and the government should realize that a serious reevaluation of the government's legislative strategy is necessary. Pakistani madrassahs have enjoyed a long history of complete autonomy and they are not inclined to give it up without a fight.

The reevaluation and policy shift that I advocate should focus on soliciting, examining in detail, and addressing the actual concerns of the mullahs. The public rhetoric of the opposition has been primarily composed of recycled anti-Western chants and slogans with little depth but great mass appeal. Essentially, they claim that the idea of the reform is part of a larger Western design to subjugate all Muslims politically and culturally. The MMA symbolically made the rejection of the ordinance a part of their political platform during the 2002 national elections, despite the fact that the law was already rendered ineffective. To a lesser extent, some religious schools defend themselves against the government's reforms by arguing that they are unnecessary since their schools aim to create ulema and religious figures, not workers catering to the demands of the market. Others argue that the ordinance is not needed because their schools are either already registered with the government in some capacity or already teach secular subjects.⁸⁸

While the clergy's paranoia over Western involvement is understandable, especially considering the significant degree of American involvement in pushing the madrassah reforms, it does not overrule the necessity for the reforms. The value and need for literacy and other basic skills among a society's youth, whatever their chosen profession, should be self-evident,⁸⁹ as should the categorical rule that violent extremism and its dissemination may not be tolerated by any government. However, a similar maxim must be that the rights and legal protections guaranteed to a group of people may not be trounced or ignored because their religious beliefs lean to the right of the majority. The clergy jealously safeguard their unchecked control of

⁸⁸ Editorial, *Subject Reform*, THE NEWS ON SUNDAY, June 29, 2003.

⁸⁹ In fact, this principle is championed throughout Islamic thought and history, as Musharraf pointed out in his address, "Islam teaches us to seek knowledge, even if it involves travel to China. I am sure you are aware that the Prophet (Peace Be Upon Him) had told prisoners of war in the Battle of Badar that they would be set free if each of them imparted education to ten Muslims. Quite obviously, this education could not have been religious education as the prisoners were non-Muslims. So the Prophet (Peace Be Upon Him) was actually referring to worldly education." Musharraf, *supra* note 5.

madrassah finances, students, and syllabi⁹⁰ and underlying this resistance are legitimate *legal* claims and concerns that question the constitutionality of the Madaris Registration Ordinance.

B. *Legal Critique*

Article 5(2) of the Constitution uniformly provides that “Obedience to the Constitution and law is the inviolable obligation of every citizen,” making no distinction between the general public and those entrusted with the task of governing and protecting them.⁹¹ This obligation is further supplemented by a corresponding protection extended to all citizens by Article 4 of the Constitution which declares, “To enjoy the protection of law and to be treated in accordance with law is the inalienable right of every citizen.” Clearly, the Constitution of the Islamic Republic of Pakistan places a great deal of emphasis on guaranteeing its citizens a significant degree of protection from their own government and so the legislative and executive actions being considered in this paper—as well as in the policymaking institutions of the country—must be examined and challenged within that framework.

Specifically, both Pakistani citizens and non-Pakistanis within the country are protected by Articles 8 to 28 of the Constitution: the “Fundamental Rights.” Sadly, the history of Fundamental Rights in Pakistan is deeply troubled, to say the least. Fundamental Rights were introduced in Pakistan through its first Constitution in 1956. When the Constitution was abrogated two years later, though, so were the Fundamental Rights. An amendment in 1964 added a new list of Fundamental Rights to the Constitution of 1962, but they existed in a state of perpetual suspension due to the Ayub Khan government’s declared state of emergency and were ultimately revoked when the 1962 Constitution was also abrogated. The Fundamental Rights of the 1973 Constitution were similarly suspended until the lifting of General Zia ul Haq’s martial law and the state of emergency in 1985.⁹² Most recently, the Constitution was temporarily suspended (1999 to 2002) following the coup by General Musharraf, but the General expressly declared that the Fundamental Rights “continue[d] to be in force” during that time.⁹³

⁹⁰ Looney, *supra* note 20 at 266.

⁹¹ ASIF SAEED KHAN KHOSA, *Constitution and the Police in Pakistan, in HEEDING THE CONSTITUTION: A COLLECTION OF ARTICLES, PAPERS AND LECTURES ON THE CONSTITUTION OF THE ISLAMIC REPUBLIC OF PAKISTAN, 1973 AND OTHER LEGAL SUBJECTS* 321, 321-348 (P.L.D. Publishers 1995).

⁹² *Ibid* at 324.

⁹³ Provisional Constitution Order No. 1 of 1999 (Oct. 15, 1999) § 2(3).

Although the Fundamental Rights are currently in full effect (and have “legally” been so since 1985), it is not hard to see why they command less respect and compliance than, say, the American Bill of Rights. Generations of lawyers, judges, policemen and citizens were denied access and insight to the rights, hindering what should have been the backbone of the Constitution from successfully taking root in Pakistani legal and constitutional culture. But there is no reason that the irreverent attitudes of the past should continue. The current government professes to be “introducing” true democracy into the country;⁹⁴ young law students are studying the Rights, lawyers are filing petitions based on them, and the Judiciary now has a substantial history behind them of declaring laws void and State actions unconstitutional on grounds of violating Fundamental Rights.⁹⁵ This consciousness must be further developed, society be made aware, and government officials at all levels be held accountable.

The very first Fundamental Right, Article 8 of the Constitution, boldly declares any past, present, or future law in derogation of any Fundamental Right to be void.⁹⁶ Any existing law inconsistent with the rights conferred by Chapter 1 of Part II shall be void,⁹⁷ it maintains, and moreover, the State *shall not make* any law which abridges the rights so conferred.⁹⁸ Every governmental law, ordinance, rule and regulation, therefore, must pass that test,⁹⁹ and the Madaris Registration Ordinance may not be able to do so. Sources from the Ittehad have raised the concern that particular clauses in the ordinance seem constitutionally suspect.¹⁰⁰

Under Section 13(1)(a) of the ordinance, the government is authorized to appoint an auditor of its choice for the mandatory audit of the madrassahs' accounts. Section 13(1)(c) further directs each madrassah to keep all assets and finances in declared accounts in government appointed banks. On the revelation of any alleged fault or oversight, the government will proceed to “suspend or cancel the certificate” of the madrassah under Section 14, then seize its assets and properties and shut down the institution.

The propensity for abuse under these provisions seems obvious and the Ittehad's apprehension toward granting such sweeping powers to an already antagonistic government is not surprising. Their fear, of course, is that a government official may cite any imaginable pretext necessary to invoke Section 14 of the ordinance and cancel the madrassah's certificate. With all

⁹⁴ *Transcript of Interview with Pervez Musharraf*, THE CHRISTIAN SCIENCE MONITOR, Sept. 10, 2002, at <http://www.csmonitor.com/2002/0910/p25s02-wosc.html>.

⁹⁵ KHOSA, *supra* note 91 at 324.

⁹⁶ *Province of East Pakistan v. Mehdi Khan*, P.L.D. 1959, S.C. 387.

⁹⁷ PAK. CONST. art. 8, § 1.

⁹⁸ *Ibid* § 2.

⁹⁹ *Government of N.W.F.P. v. Muhammad Irshad*, P.L.D. 1995, S.C. 281.

¹⁰⁰ Mahmood, *supra* note 58.

of the school's resources and assets located in government approved and monitored accounts within pre-selected banks, the government agency would have no trouble (and clearly, a major incentive) in confiscating the funds. On their face, such abusive powers appear to be plain violations of Article 4, which first articulates the Constitution's concept of due process of law, and Article 24(1), which guarantees that "No person shall be deprived of his property save in accordance with law." There is no question that the madrassah grounds, educational materials, and finances are all private property protected by the Constitution. Even depriving a person of the right to gain a livelihood by legal practice, as these clauses very well could do, must be justified by the government.¹⁰¹

It is true that the ordinance includes some clauses, which the government may claim satisfy the procedural due process requirements in this case. Section 14(2) gives any aggrieved party the right to file a written appeal to the government upon suspension or cancellation of a madrassah's Certificate. However, the issue in due process cases such as this one comes down to balancing private and government interests and the question becomes whether additional procedural requirements to the ones already in place are necessary or not.¹⁰² It would be useful here to look to American jurisprudence given that the Pakistani Constitution and its superior Courts borrowed heavily from the concept of due process of law in the United States.¹⁰³

In the case of *Goldberg v. Kelly*, the United States Supreme Court held that terminating government benefits from a welfare recipient without a pre-termination hearing was unconstitutional because it deprived the citizen of property without sufficient due process of law. The law in question allowed the welfare recipient under review to submit a written statement in his defense, but the Court ruled that the private interest—the individual's only source of income—and the risk of erroneous deprivation outweighed the burden to the government in allowing an actual pre-termination hearing instead of a written appeal.¹⁰⁴ In *Mathews v. Eldridge*, the Court formalized the equation by ruling that additional procedures are always warranted if the private property interests affected and the probable value (increased accuracy) of the procedures are greater than the increased burden on the government.¹⁰⁵

In the present case, the government has apparently given itself the ability to deprive a group of already low-income individuals of their savings, real

¹⁰¹ *Government of Pakistan v. Syed Ikhtlaque Hussain*, P.L.D. 1965, S.C. 527.

¹⁰² See *Mathews v. Eldridge*, 424 U.S. 319 (1976).

¹⁰³ SYED SHABBAR RAZA RIZVI, CONSTITUTIONAL LAW OF PAKISTAN: TEXT, CASE LAW AND ANALYTICAL COMMENTARY 44, (Vanguard Books 2002).

¹⁰⁴ *Goldberg v. Kelly*, 397 U.S. 254 (1970).

¹⁰⁵ *Mathews*, 424 U.S. at 347.

property, and only source of future earnings in a situation with an extremely high risk of erroneous deprivation, legally protected only by the right to submit a written statement *post*-deprivation. According to the *Mathews* test, the Madaris Registration Ordinance clearly violates the respective party's fundamental right to due process and warrants, at the very least, additional procedures to guarantee that property is only taken "in accordance with law."¹⁰⁶

Ittehad critics point out that another clause entrusts the District Nazim to issue No Objection Certificates (NOC) required for the establishment of new madrassahs.¹⁰⁷ The Nazim is bound to inspect the proposed building of the establishment before approving its establishment. The religious scholars found the clause vague and bewildering, however, since no structure could be planned or erected before purchasing its tract of land and yet, before purchasing the land in the name of a madrassah, they need to obtain an NOC from the district government.

A constitutional challenge could very well be brought against the ordinance on the Article 4 due process issue of notice—specifically on the grounds that the regulations are unfair as they are vague and confusing.¹⁰⁸ A statute must be sufficiently definite to provide adequate notice to: the party, so they can modify their conduct to avoid penalties; the judge, to guide him in its application; and the lawyer, to guide him in defending one charged with its violation.¹⁰⁹ Fair notice of proscribed conduct and the opportunity to be heard are always interpreted to be inherent to the due process of law, and both concepts can be found in Pakistani jurisprudence¹¹⁰ and traced back to the Magna Carta as well as to basic notions of fairness.¹¹¹

Leaders of the MMA also fear that the Madaris Registration Ordinance allows the government to legally discriminate against madrassahs and the ulema. Madrassahs in Pakistan may be likened to the vast number of private NGOs (Non-Governmental Organizations) in the country, as they often provide similar services—education, food, clothing, and housing—to poor children and communities and operate under similar models and laws. Moreover, a significant percentage of these NGOs are sponsored by religious or missionary groups (mostly Christian denominations) and are invariably funded by foreign donors (mostly from Western nations). Yet, the

¹⁰⁶ PAK. CONST. art. 24, § 1.

¹⁰⁷ Mahmood, *supra* note 58.

¹⁰⁸ It is also necessary, before depriving a person of life, liberty, or property, that he must be in a position to know what he has to do or abstain from doing. "When the statute is vague, the Courts may declare it void." GHAFFAR, *supra* note 17 at 93 (citing A.I.R. 1950 S.C. 27; 1950 S.C.R. 88; 5.1. Cr. L.J. 1383).

¹⁰⁹ See P.L.D. 1970 Lah. 560 (D.B.); P.L.D. 1971 S.C. 550; 23 D.L.R. S.C 44.

¹¹⁰ See P.L.D. 1994 Kar. 60 (D.B.).

¹¹¹ See *Boyce Motor Lines, Inc. v. United States*, 342 U.S. 337 (1952); MAGNA CARTA § 39 (1215).

government requires no legal checks on their funding or operations and has no mechanisms in place that even closely resemble the provisions of the Madaris Registration Ordinance.¹¹²

Another fundamental tenet of the due process of law holds that a government must apply its policies similarly to similar situations and to all parties alike.¹¹³ This issue of consistency in enforcing rules and regulations is absolutely necessary to prevent discrimination and other arbitrary and capricious actions on behalf of the government and its agencies. Even more importantly, it is expressly forbidden by Article 25 of the Constitution, which entitles all citizens “to equal protection of law.” The guarantee of equal protection requires that all persons shall be treated alike, under like circumstances and conditions.¹¹⁴ Seriously addressing such a glaring problem with the law in question could help the government make significant headway in mending its relations with the mullahs and moving forward together toward effective madrassah reform. MMA representatives have linked their issue with NGOs and publicly stated that “unless the government monitors foreign help to various West-funded NGOs, the [law] on religious institutions would not be accepted.”¹¹⁵ The logical conclusion of that argument seems to be that if the government *were* to treat NGOs equally, madrassahs representatives would be inclined to cooperate.

More generally, the Madaris Registration Ordinance comes noticeably close to violating the Constitution’s Fundamental Rights to freedom of speech,¹¹⁶ freedom to profess religion and to manage religious institutions,¹¹⁷ and safeguards as to educational institutions in respect of religion.¹¹⁸ The Constitution does qualify these protections as subject to law and public order,¹¹⁹ of course, and the government may reasonably argue that its regulations fall within those limitations. After all, Sections 9(c) and 9(d) of the ordinance simply require that madrassahs “shall not encourage an atmosphere of religious confrontation, sectarianism, polarization or hatred,” and “shall not raise any military or paramilitary force or permit use of any

¹¹² See Mutahir Ahmed, *Rationale Behind Madressahs*, THE NEWS ON SUNDAY, June 30, 2002.

¹¹³ For examples in Pakistani jurisprudence see GHAFAR, *supra* note 17 at 222 (referring to P.L.D. 1991 Quetta 7 (D.B.); P.L.D. 1968 Kar. 73). For examples in American jurisprudence, see generally *Arizona Grocery Co. v. Atchison, Topeka & Santa Fe Railway Co. et al.*, 284 U.S. 370 (1932); *Forsyth County, GA v. The Nationalist Movement*, 505 U.S. 123 (1992).

¹¹⁴ See GHAFAR, *supra* note 17 at 223 (citing 1990 C.L.C. 8 (D.B.); P.L.J. 1976 Lah. 148).

¹¹⁵ Ahmed, *supra* note 112.

¹¹⁶ PAK. CONST. art. 19.

¹¹⁷ *Ibid* art. 20.

¹¹⁸ *Id.* art. 22.

¹¹⁹ See *Id.* arts. 19, 20, 22.

arms, ammunition or equipment for such purposes,” respectively. Such restrictions appear perfectly reasonable and necessary to maintain “law and public order.”

However, the overwhelming majority of Pakistan’s madrassahs are not engaged in militant conduct and even they fear the broad powers given to the government in the name of security. For instance, all of the schools, regardless of how mainstream or moderate, belong to particular sects within Islam—whether Deobandi, Salafi, or Shia—and teach according to their beliefs. It is true that the government should promote ideals of tolerance among the schools, a notion of paramount importance in Islamic thought and history, but they need to make clear that threats of eliminating “sectarianism” do not go so far as to curtail fundamental freedoms of teaching one’s own religious beliefs. Article 20(b) guarantees that “every religious denomination and every sect thereof shall have the right to establish, maintain, and manage its religious institutions.” The government does have the power to regulate the manner in which such institutions may be established, maintained, and managed, but according to the late Chief Justice Muhammad Munir, may only do so when an institution invites breaches of peace or engages in overt acts against public order.¹²⁰ In the current situation, the government may be overextending its reach and thereby turning away its potential allies.

Lastly, a policy argument may be made questioning the effect of the Madaris Registration Ordinance in light of constitutional obligations on the State to help the Muslims of Pakistan live according to Islam. Article 31(1) declares that “Steps shall be taken to enable the Muslims of Pakistan, individually and collectively, to order their lives in accordance with the fundamental principles and basic concepts of Islam and to provide facilities whereby they may be enabled to understand the meaning of life according to the Holy Quran and Sunnah.” It could be said that the law in question defies this principle and, in fact, does quite the opposite. Article 31 falls under the Constitution’s “Principles of Policy,” however, which set down the main ideals and goals which the State is meant to strive to achieve in the society, but are not enforceable through Pakistan’s courts of law.¹²¹ A constitutional petition could be brought under a nearly identical clause in Article 2(A), the Objectives Resolution,¹²² but it is unlikely to be successful given the purpose of the ordinance, the temperament of the current government and superior Courts,¹²³ and the lack of any supporting precedent.¹²⁴

¹²⁰ *Jibendra Kishore Acharyya Chowdhry v. The Province of East Pakistan*, P.L.D. 1957 S.C. 9.

¹²¹ KHOSA, *supra* note 91 at 324.

¹²² See PAK. CONST. ANNEX.

¹²³ Charles H. Kennedy, *Repugnancy to Islam—Who Decides? Islam and Legal Reform in Pakistan*, INT’L & COMP. L.Q. 4, 786 (Oct. 1992).

The government of Pakistan is at a critical juncture in its history. It recognizes that no government interest is more important than the security of the nation and the events following September 11th, 2001 have brought that issue to the forefront of its attention. The government's madrassah reform initiatives are a product of the pressures and challenges inherent in those new socio-political realities. Yet, in considering all of the arguments discussed above, the government—including the President, Parliament, and especially the Judiciary—needs to ask itself an important question: at what point does the cost to civil liberties from legislation designed to prevent violent extremism outweigh the added security that the legislation provides?

I contend that the government has failed to sufficiently engage in the self-reflective process of balancing those interests. My legal criticisms of the Madaris Registration Ordinance are not dispositive; by no means do they provide a final resolution of whether the law is or is not constitutional. In fact, the argument is already moot since the controversial law was never implemented. Rather, the purpose of my critique was to problematize the matter, to explore the possible legal deficiencies and concerns over civil liberties stemming from the ordinance, and to suggest that the government should reevaluate its approach in light of the aforementioned arguments. There is no doubt that the government needs to handle the problem of religious violence and militancy that seems to have infiltrated a sector of Pakistani madrassahs, but its previous attempts have failed and my project seeks to understand why—or at the very least, to offer issues that it needs to consider to achieve a more effective outcome. It is beyond the scope of this paper to actually redesign the new legislation, but it is important to point out what may have been wrong with its predecessor.

VI. CONCLUSION: ON CURRENT POLICY

After the failure of the Madaris Registration Ordinance by late 2002, the government abandoned its earlier tough talk, reversing its entire strategy. “We are not looking to confront the [religious scholars]; we want a constructive engagement,” said Information Minister Shaikh Rashid Ahmed.¹²⁵ By mid 2003, the government announced its proposed Madrassah Reform Project (MRP), through which the government would spend Rs. 1.82 billion over five years to reform the madrassah sector. The government granted funds, additional teachers, computers, and educational material to the schools to incorporate secular subjects into the curricula, including

¹²⁴ See GHAFFAR, *supra* note 17 at 19-38.

¹²⁵ *Government Trying to Control Madaris, says Report*, DAWN, Aug. 19, 2003.

English, economics, Pakistan studies and computer science.¹²⁶ However, the funding was not conditional on registration, standardization of curricula, or oversight of finances¹²⁷ and thus the project realized none of the critical changes sought by the original Madaris Registration Ordinance.

Simply offering unconditional financial assistance to the madrassahs is not the answer and the fact that this policy continues to be in effect suggests that critics are correct to allege that Musharraf's government "remains as unwilling as it was in January 2002 to trample on the mullahs' turf."¹²⁸

Instead, the government should reengage the ulema directly and ultimately resume the legislative process as the primary means of madrassah reform. It must perform the incredibly difficult balancing act of enacting, implementing, and enforcing a law with enough legislative teeth to prevent the propagation of militant ideals in Pakistan's Islamic schools—particularly from abroad—all while respecting the limitations that the Rule of Law imposes on the government. In times when terror is a threatening possibility, a State must constantly renegotiate its concerns for the security as well as the civil liberties of its citizens, but neither talking tough and exuding arrogance nor backing down and giving up is the solution. Whatever the final policy decision, it must be fervently committed to, but must also be arrived at carefully, thoughtfully, and reverential of the law and the legal rights of the schools.

To Western critics of the government, it should be made clear that all madrassahs are not producing militants and fanatics. The great majority of madrassah students remains dedicated to a pursuit of Islamic study and poses no threat to society. Hasty and ill-planned crackdowns on the system—even coming from problematic legislation—will only produce chaos and strengthen the forces of extremism. On the other hand, the country's religious leaders need to be convinced that in the long run, these reforms are not pegged at September 11th. They are designed for the security, stability and prosperity of the nation and, in fact, will only empower madrassah students, providing them with access to a more well-rounded education and eventually to influential bureaucratic and top-government positions.

However, the government can only gain credibility with the opposition by first addressing their concerns. By taking a more sophisticated approach to the process of madrassah reforms—for instance, by considering the various points discussed in this paper—the administration would be on much stronger footing to expect cooperation from the Ittehad. At that point, the government can successfully do what it is mandated to do: both

¹²⁶ See Nasir Iqbal, *Centre Signs MoU with Provinces, FATA & FANA: Madaris Reforms*, DAWN, June 20, 2003.

¹²⁷ See *Rs.5.7bn Allocated for Madaris Reform*, THE NEWS, Jan. 8, 2004.

¹²⁸ 73 ICG ASIA REPORT, *supra* note 48 at 9.

forcefully govern and respectfully ensure that the Rule of Law is observed within its territory.

